No. 89-327



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, *et al*

*Petitioners,*

VS.

LLOYD'S LEASING, *et al*

*Respondents.*

VS.

CONOCO INC.

*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## CONOCO INC.'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied existing federal rules and maritime law in this case.
2. Whether there is present in this case any significant question for review by this Court.

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### STATEMENT OF THE CASE

Petitioners' statement of the case fails to present a number of key points which were central to the consideration by the district court and the Fifth Circuit.

It is not disputed that the M/T ALVENUS suffered a hull collapse on July 30, 1984, about 11 miles offshore of the entrance to the Calcasieu River, which leads to the port of Lake Charles. Approximately 65,500 barrels of Venezuelan crude oil escaped into the sea, of which an undetermined portion subsequently washed ashore some days later on an

area of beach extending from Rollover Pass, about 15 miles east of Galveston, to the west end of Galveston Island, about 25 miles from Galveston proper.

The owners of the M/T ALVENUS, Lloyd's Leasing, *et al*, subsequently filed a limitation action in Galveston, in which all concerned filed claims for damages of various sorts. There were a number of cross claims and third-party claims, which are not pertinent to the Petition for Certiorari before this Court.[1]

One group of claimants, who are now Petitioners for certiorari in this matter, alleged damage which resulted from oil being tracked from the beach on the feet of individuals into, primarily, places of business and public accommodation, but also homes and other locations. This tracked-in oil was made the basis for claims for physical damage, which the responses to interrogatories indicated were relatively miniscule. These claims were accompanied, however, by very much larger claims, in some cases enormous, for economic damages of various sorts, allegedly for either loss of revenue from the absence of visitors to Galveston during the period, loss of rentals because visitors to Galveston were deterred by publicity, loss of enjoyment of beachhouses, and in some cases, loss of sales opportunities of real property. Leaving aside the question of whether or not these claims should have more correctly been associated with the downturn in the Texas economy, which was in full swing in the summer of 1984, it was clear that they were not the direct result of the relatively minor physical damage. It was evident that these claimants were in hopes that the relatively minor physical damage to their premises would serve as a vehicle for the recovery of generalized economic damages of all kinds. Under the leading decision of the Fifth Circuit in *TEST-BANK*[2], which required physical damage to a proprietary

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[1] Conoco was the owner of the cargo and the voyage charterer of the ALVENUS. Claims were made by Conoco as owner of the cargo, and against Conoco by Lloyd's Leasing, *et al*, under the charter party, as well as by some of the other claimants under various theories.

[2] *State of Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

interest before consequential damages could be recovered, they had no recovery without physical damage.

A motion for summary judgment was filed against these "tracking" claimants, among others, by Lloyd's Leasing, *et al,* and was supported by Conoco. The district court was confronted with a situation in which the potential number of claimants, and the area in which they might be located, were both entirely open-ended, because there were obviously people outside the immediate area of Galveston who had been damaged similarly by oil tracked off the beaches into automobiles, and thereafter into locations visited by the drivers of the automobiles, which could have been far afield. The district court granted summary judgment with respect to the "tracking" claimants, and subsequently denied two motions for reconsideration which raised nothing new. In denying the second motion, the court indicated orally that there was no intent to reconsider, and that any further interlocutory requests would be better directed to the Fifth Circuit. This was the "order" referred to by Petitioners.[3] The district court never indicated any doubt, contrary to Petitioners' allegations both here and below.

The Fifth Circuit pointed out that the district court order was not appealable under 28 U.S.C. 1292(b), but was appealable as an interlocutory decree in admiralty, under 28 U.S.C. 1292(a)(3), and heard the appeal. Subsequently, the Fifth Circuit affirmed the decision of the district court. It is quite incorrect to state, as do Petitioners, that the Fifth Circuit reversed the trial court's holding. There is no such indication in the opinion; indeed, the Fifth Circuit discussed the holding of the district court that the damage to Petitioners was not foreseeable at some length, and stated their agreement with the conclusion of the district court.[4]

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[3] Petition, p. 3.

[4] *Lloyd's Leasing Ltd. v. Conoco Inc. v. Bob White et al,* 868 F.2d 1447 at 1449 (5th Cir. 1989); Petition, p. A-4 to A-6.

## SUMMARY OF REASONS FOR DENYING THE WRIT

Both the district court and the court of appeals reached decisions which were entirely principled, which accurately applied available precedent, and which were fully in accordance with modern principles of tort law and with the guidance of this Court applicable to tort cases involving damage to property. As is set forth in more detail below, Petitioners' contrary arguments are unfounded.

In reaching their decisions, the district court and the Fifth Circuit correctly applied the guidance of this Court with respect to Rule 56 of the Federal Rules of Civil Procedure governing summary judgments.

The issues in this matter are, contrary to the arguments of Petitioners, straightforward and involve a decision with regard to a specific group of claimants, distinguishable on narrow factual grounds from other parties to the suit. No broad issue of public policy, no constitutional issue, no issue of federalism, no issue of uniformity of maritime law, no issue of conflict between the circuits, and, indeed, no issue justifying review by this court, is presented.

## ARGUMENT

### I.

**The District Court correctly followed the guidance of this Court on summary judgments, present day principles of tort law, and Fifth Circuit precedent in its January 22 Order.**

The district court was confronted with a situation in which, as mentioned before, there was no rational geographic limitation which could be applied to set a limit on the "tracking" claimants to be included in the action. The geographic limits of impact were completely open-ended, since no one had any idea how much oil from the Galveston Island beaches had wound up on the feet of people who subsequently tracked it into their automobiles and then drove to parts unknown. The quantum of damages of people in

inland cities in Texas or elsewhere might be less than that of a motel owner on the Galveston waterfront, but quantum did not offer a rational or principled basis for determining the existence of a cause of action. Neither was there any rational limit in time, because studies of oil spills tell us that some oil from past spills, which apparently becomes buried in the sand in the surf zone along beaches, can appear on the beaches months and even years later. This oil could be tracked like any other. The district court was mindful of the *en banc* opinion of the Fifth Circuit in *TESTBANK*[5], which held that, in mass pollution cases such as was presented, a "bright-line" approach was to be preferred over case-by-case resolution because it made for more objective and principled decision, as well as making resolution simpler and cheaper. This question had been very clearly presented in *TESTBANK*, and the majority's preference for the "bright-line" approach which could be applied simply, and in future cases, was quite clear in the opinion.[6] *TESTBANK* itself was a "pragmatic limitation on the tort doctrine of foreseeability".[7]

*TESTBANK*, however, did not appear to be the answer. At the time the district court considered the present case, there was no guidance available as to whether a nexus between physical damage to proprietary interests and consequential damages was required for recovery. While it seemed logical, and the district court had implied that it so interpreted the opinion, the opinion did not say so. Therefore, on the face of the question, the *TESTBANK* limitation on the scope of liability appeared not applicable because there was physical damage, although *de miminis*, to a proprietary interest.

In such circumstances, there was guidance available to the district court in another recent Fifth Circuit case, *Consolidated Aluminum*.[8] This involved a situation where there was physical damage to an aluminum plant resulting from an interruption to gas supplies brought about by damage

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[5] 752 F.2d 1019. See note 2, *supra* for full citation.

[6] 752 F.2d 1019 at 1029.

[7] 752 F.2d 1019 at 1023.

[8] *Consolidated Aluminum v. C. F. Bean*, 772 F.2d 1217 (5th Cir. 1985); 639 F. Supp. 1173 (W.D. La. 1986); 833 F.2d 65 (5th Cir. 1987).

to a pipeline by a dredge. The first Fifth Circuit opinion in that case held that *TESTBANK* was inapplicable because the consequential damages resulted from the physical damage to the aluminum plant, and *not* the damage to the pipeline.[9] They remanded a grant of summary judgment on behalf of the dredge owner, Bean, to the Louisiana district court, with instructions to analyze the case on the basis of traditional admiralty tort principles of foreseeability, to determine whether Bean had any duty to Consolidated.[10] The district court, acting in accordance with the general philosophy of the Fifth Circuit in matters of property damage, the principles of *TESTBANK*, and with due consideration of the problems which would be generated by an effort to set any rational geographic limitation on which of the pipeline customers could recover, selected a rule which would allow recovery for the damage to the pipeline itself, and for damage directly caused by the escape of gas, but excluded damages, physical or otherwise, for those whose only contact with the accident was as a customer of the pipeline.

The Fifth Circuit affirmed, in an opinion containing a considerable discussion of general tort law rationale supporting the conclusion of the district court.[11]

In the case now before this Court, the Texas district court also needed to consider the clear guidance of the Fifth Circuit in property damage tort cases, such as *TESTBANK* and *Consolidated*, and numerous others, towards limiting the extent of liability, rather than adopting the more expansive approach applied by many courts in matters involving personal injury and products liability, and to a lesser extent in liability for ultra hazardous activities. In matters of property damage, the recent and rather restrictive decision of this Court in *East River Steamship*[12] was important. It is not necessary to burden this brief with a prolonged discussion of

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[9] Thereby at least implying that there *was* a nexus requirement in *TESTBANK*.

[10] 772 F.2d 1217 at 1218 n. 2 and 1224.

[11] 833 F.2d 65 at 67; 639 F. Supp. 1179 (W.D. La. 1986).

[12] *East River Steamship Corp. v. Transamerica DeLaval, Inc.*, 476 U.S. 858 (1986); See also, generally, R. Force, *Marine Products Liability in the U.S.*, XI Mar. Law. 1 (1987).

the basic dichotomy between the two approaches to tort liability, which a recent edition of a treatise[13] requires over 40 pages to outline. It is sufficient to state that the guidance of this Court and the Fifth Circuit in matters of property damage is toward the less expansive view of the majority opinion in *Palsgraf*,[14] which said that negligence was a matter of relation between the parties, which must be founded on the foreseeability of harm to the person.

The district court in the present case, seeking an easily applied general rule, concluded that, while physical damage to things like the hulls of boats or piers ashore which encountered the oil, was foreseeable, "tracking" damage was not. Summary judgment on behalf of Lloyd's Leasing, Inc. was granted.[15]

## II.

**The Fifth Circuit correctly followed its own precedents, the guidance of this Court with respect to summary judgment and tort law in reaching its decision.**

The action of the Fifth Circuit is of considerable interest.[16] To begin with, contrary to the impression created by Petitioners, it is clearly apparent that there was no disagreement whatever on the basic decision, which was that the tracking damage claimants should not have a cause of action for consequential damages because it was contrary to the views of the Fifth Circuit as set forth most recently in both *TESTBANK* and *Consolidated*.[17] The only disagreement was on the exact analysis.

The majority agreed with the district court's view that *TESTBANK* was not applicable, and with that court's applica-

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[13] *Prosser and Keeton on Law of Torts* (5th Ed. 1984.)

[14] *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

[15] Summary judgment standards, as set by this Court, are discussed at the beginning of Section III, *infra*, since they apply to both opinions below.

[16] *Lloyd's Leasing v. Conoco v. Bob White, et al*, 868 F.2d 1447 (5th Cir. 1989).

[17] Notes 2 and 8, *supra*.

tion of *Consolidated,* and the foreseeability analysis. They concluded that the appellees had no duty to those who suffered "tracking damages". On the particular facts present, as to the appellees, these particular claimants, not directly exposed to the oil, fell outside the limits laid down in *Consolidated.* "... [T]he district court's determination that the harm suffered by the plaintiffs was not foreseeable and that the appellees therefore owed no duty to the appellants is correct."[18] The majority added to the rationale of the district court, which they had stated was correct, the additional factor that the shores of the western Gulf of Mexico were sufficiently undeveloped so that it was not reasonably foreseeable that oil would come ashore in such a densely populated location that the risk of people tracking it off the beach was reasonably foreseeable.[19]

Judge Higginbotham, who was the author of the *en banc* opinion in *TESTBANK,* preferred a different approach. He concluded that the majority's approach to foreseeability was somewhat strained. As the author of the *TESTBANK* opinion, and doubtless with the implication of *Consolidated* in mind,[20] he evidently felt free to put a gloss on *TESTBANK,* making clear that a direct nexus *was* required between consequential damages and the physical damages to a proprietary interest to permit a recovery. In other words, he made clear what had been only implicit before, which was that the only consequential damages recoverable under *TESTBANK* were those which resulted directly from the physical damage itself.[21] It seems reasonable that the author of an *en banc* opinion should be accorded more than ordinary deference as an interpreter of that opinion. Judge Higginbotham would have held that, while the tracking damage claimants should have been allowed a cause of action for their physical damages only, they had no cause of action for economic damages which did not arise directly from those physical damages. In briefing, it had been argued by both Lloyd's Leasing and

[18] 868 F.2d 1447 at 1449.
[19] *Id.*
[20] *See* notes 8 and 9, *supra.*
[21] 868 F.2d 1447 at 1451.

Conoco that such a nexus was implicit in *TESTBANK* and had been recognized by the district court. It was a coincidence that the matter fell to a panel which included Judge Higginbotham. Petitioners argue at great length in various places in their petition that Judge Higginbotham's opinion is truly in disagreement with the majority. So to argue ignores what the entire panel clearly saw as the central issue in the case. Indeed, Judge Higginbotham's opinion clearly recognizes this:

> The majority understandably balks at the claims of businesses who point to the tracking of oil. I would find the answer in *TESTBANK*, rather than in a forced reading of foreseeability, for the reasons we there explained. Our insistence upon physical injury to a proprietary interest was *a forthright pragmatic limit on the doctrine of foreseeability.* Undoubtedly, many persons suffered some foreseeable physical loss and yet were not allowed to recover general economic losses. These physical losses were not a direct consequence of the collision and spill, but were the secondary consequences of shipping delays.[22]

He then went on to state that:

> *TESTBANK* limits which parties can recover for foreseeable injuries. In this appeal, the claimants' only physical injury is two parties removed from the most immediate *TESTBANK* plaintiff, the owner of the affected shore property. . . .
>
> I would hold that these claimants cannot recover general economic losses attributed to the general loss of custom attending the spill because they have no physical injury within the meaning of *TESTBANK*.[23]

Judge Higginbotham would have allowed a cause of action only for "losses attributable to actual physical injury and any losses which *that* physical injury causes."[24] It was abundantly clear from the record before the Fifth Circuit and the pleadings submitted by Petitioners, claimants below, that

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[22] 868 F.2d 1447 at 1450-1. (Emphasis supplied.)

[23] 868 F.2d at 1451.

[24] 868 F.2d at 1451, emphasis in original.

what was sought was a recovery on a broad basis for all possible economic consequences in any way related to the oil spill. To argue that there was real disagreement on the panel of the Fifth Circuit, and to take Judge Higginbotham's remarks about foreseeability out of context, as do Petitioners, is simply to ignore the focus of the panel on the fundamental issue.

## III.

**The other arguments of Petitioners are without foundation.**

The Petitioners additionally argue that the grant of summary judgment in this matter was contrary to the guidance of this Court as to matters appropriate for summary judgment. In the first place, the case is by no means complicated so far as regards the "tracking" claimants. Either they have a cause of action for their claims or they do not. Any complications in the case do not arise from the fact of the spilled oil, from which the claims of Petitioners arise. Rather, they involve the dispute between the shipowners, clearly liable in the first instance, and various other parties whom the shipowners, and some others, allege may have had something to do with causing the oil spill. The rather complex question of distribution of liability amongst these parties is a matter of indifference to the Petitioners, as long as there is at the end of the day a solvent liable party.

Secondly, no far-reaching issue of public policy is present, as alleged. The ruling of the district court and the Fifth Circuit involved a specific group of claimants who had been injured in a rather novel and involved factual circumstance. While it is beyond question that *Consolidated*, and in particular *TESTBANK*, may have involved broad questions of public policy, the case now before this Court on a petition for certiorari is simply a highly fact-specific application of one or both of those cases.

Petitioners also argue that this Court has cautioned against use of summary judgment procedures. They quote

in support of this some older precedents.[25] This is an effort to ignore the guidance on summary judgment procedures provided by this Court in the very important series of cases decided on the subject in 1986.[26] These cases provide expanded and up-to-date guidance on the uses to which summary judgment procedures should be put. The general guidance to be found in this trilogy transcends their factual context because it is consistent over a broad spectrum. *Matsushita* was an antitrust case; *Celotex* was a toxic tort case, and *Anderson* was a libel case. As to general policy, it is clear that summary judgment is not to be considered a harsh and drastic remedy disfavored by the courts. In *Celotex*, this Court said:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the 'just, speedy and inexpensive determination of every action.'[27]

This Court then went on to point out that Rule 56 must be read not simply to protect the rights of plaintiffs with real claims, but also the rights of defendants to dispose of claims which do not have a sufficient basis.[28]

It is clear that this Court intended the review of factual evidence to extend beyond the simple question of whether there is any possible factual dispute to the quality and quantity of the evidence. Three years of discovery had provided for the district court an ample factual basis in the instant case. In *Anderson*, it is pointed out that genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant.[29] Summary judgment is to be granted if the pretrial evidence presented to oppose it "is merely colorable" or "is not significantly

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[25] *Kennedy v. Silas Mason & Co.*, 334 U.S. 249 (1948); *Arenas v. U.S.*, 322 U.S. 419 (1944).

[26] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita v. Zenith*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

[27] 477 U.S. at 327.

[28] *Id.*

[29] 477 U.S. at 249.

probative."[30] It would be presumptuous to further explain to this Court the clear guidance provided by that important trilogy of cases.[31] It is sufficient to state that Petitioners' effort to argue that the district court erred in granting summary judgment on the issues presented, and that the Fifth Circuit "has sanctioned a gross departure from Fed. R. Civ. P. 56" in affirming, is absolutely unfounded.

In arguing that the Fifth Circuit has not followed its own authority, Petitioners cite *Horton & Horton, Inc. v. T/S J.E. DYER*[32] and *Watz v. Zapata Offshore*[33]. They also cite *Nunley v. M/V DAUNTLESS COLCOTRONIS*[34] and *Commercial Transport Corp. v. Martin Oil Service*[35]. These cases do not stand for the propositions for which Petitioners cite them.

*Horton* and *Commercial Transport* are both outdated, for two reasons. First, they are long prior to *TESTBANK* and *Consolidated.* More importantly, they are outdated for a reason which is clear when the full passage from the first edition of Gilmore and Black, which is quoted in the opinion and relied on by Petitioners, is read. That context[36] shows that the distinction being drawn is between shore law, where contributory negligence was, in 1957, often a total bar to recovery, and the then existing admiralty law, which used the half-damages rule in collision cases. Since 1957, contributory negligence as a bar to recovery has been almost entirely replaced ashore by some form of comparative fault, while the arbitrary half-damages rules in collision cases in admiralty was replaced in 1975 by the proportionate fault rule of *Reliable Transfer.*[37]

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[30] 477 U.S. at 249-250.

[31] *See,* also, generally, Fitzwater, Johnson and Henry; *Recent Summary Judgment Jurisprudence,* 5 Fifth Circuit Reporter 767 (September 1988); Childress, *A New Era for Summary Judgments,* 116 F.R.D. 183 (1987).

[32] 428 F.2d 1131 (5th Cir. 1970).

[33] 431 F.2d 100 (5th Cir. 1970).

[34] 727 F.2d 455 (5th Cir. 1984).

[35] 374 F.2d 813 (7th Cir. 1967).

[36] G. Gilmore and C. L. Black, *The Law of Admiralty,* § 7.5, p. 404 (1st Ed. 1957).

[37] *United States v. Reliable Transfer,* 421 U.S. 397 (1975).

*Watz*[38] was a personal injury case which applied state law, rather than maritime law. The state law represented the expansive philosophy of tort law, which is opposed to the philosophy of this Court in property damage cases as set out in *East River Steamship*[39]. Furthermore, the portion of the Restatement quoted in *Watz*, upon which Petitioners rely, was adopted only in connection with the argument made by one of the defendants against whom there was a products liability claim.

Petitioners further argue that the decisions of the district court and the Fifth Circuit were based on the activity of third parties constituting a "superseding cause", or an independent intervening force. In the first place, a careful reading of the decisions of the district court and the Fifth Circuit clearly indicates that any such argument is rendered highly questionable by the face of the opinions themselves, neither of which indicate a ruling on any such narrow basis. Secondly, both *Horton* and *Commercial Transport*[40] were cases that dealt with "subsequent intervening negligence." This is nothing but a convenient means of discussing a particular category of cases which involve analysis of foreseeability under specific circumstances, where two independent forces act, and the second causes harm which would not have been caused by the first[41]. This is by no means a separate category of cases, in which the actions of the Court should be guided only by similar cases. This is simply a sort of case in which the foreseeability to be reviewed includes both the foreseeability of the intervening force and that of the other elements to be considered in cases which lack an "intervening force." The important point is that the analysis of foreseeability with respect to the intervening force is not a substitute for the analysis of foreseeability with respect to the original actor. It is an additional step which may intervene to exonerate the original allegedly negligent party.

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[38] *Watz v. Zapata Offshore Co.*, 431 F.2d 100 (5th Cir. 1970).

[39] Note 12, *supra*.

[40] Notes 32 and 35, *supra*.

[41] *Prosser and Keeton on Law of Torts*, § 44, p. 301 *et seq.* (5th Ed. 1984).

In an effort to buttress their argument, Petitioners also cite *Nunley v. M/V DAUNTLESS COLCOTRONIS*[42]. This case is so far afield factually from *Consolidated, TESTBANK,* or the case before this Court, that it offers nothing of relevance in connection with the district court's order and the opinion of the Fifth Circuit. The issue decided in *Nunley* was that the terms of the Wreck Act did not interpose a non-negligent party, who had failed to carry out successfully his duty to mark a wreck, to supersede the liability of a concededly negligent party who was responsible for sinking the wreck in the first place. The *en banc* Fifth Circuit was concerned to enforce the Wreck Act in accordance with its terms; the main concern was that the statute not be summarily applied so as to exonerate the parties who caused the sinking of the barge and place the whole fault on other relatively blameless parties who had simply been unable to locate the wreck in order to mark it.

## IV.

## Conclusion

It is clear from the foregoing that this case is one which was decided on a very specific set of facts by the district court and the Fifth Circuit, and which does not involve issues of broad applicability. Petitioners argue that broad matters of policy applicable to many other oil pollution cases are here involved. As has been pointed out above, the issue with respect to Petitioners is an extremely straightforward one, and one which simply involves the question of whether or not a cause of action is available under their specific factual circumstances. Broader questions of liability to others on the coast and elsewhere are still to be addressed in the main action from which this is an interlocutory appeal.

The Fifth Circuit is far from sanctioning "a gross departure from Fed. R. Civ. P. 56", as Petitioners allege.[43] The district court and the Fifth Circuit have followed with care

[42] 727 F.2d 455 (5th Cir. 1984).

[43] Petition, p. 5.

the guidance from this Court on the standards for summary judgment and the uses to which this mechanism is to be put in protecting the rights of defendants to dispose of claims which do not have a sufficient basis.[44]

Both the district court and the Fifth Circuit reached a principled, reasoned and correct decision based on ample precedent within that circuit. There is no question presented here of a broad issue of public policy; there is no issue of federalism or the uniformity of maritime law; there is no implication that the circuit court has disregarded its own precedents, nor is there any indication of a conflict between circuits. In short, no issue is presented which would justify review by this Court.

Respectfully submitted,

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[44] *Celotex v. Catrett*, 477 U.S. at 327.

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